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United States of America

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,) Criminal Case No. 08cr0285-H
13 Plaintiff,)
14 v.)
15)
16 ESMERALDA SALAZAR-)
SEPULVEDA,)
17)
18 Defendant.)
Date: March 17, 2008
Time: 2:00 p.m.
Court: The Hon. Marilyn L. Huff

20 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel,
21 United States Attorney, Karen P. Hewitt, and Assistant U.S. Attorney Rebecca S. Kanter, and hereby
22 files its Response and Opposition to Defendant's Motions to Compel Discovery, Preserve and Re-Weigh
23 Narcotics, and File Further Motions. This Response and Opposition is based upon the files and records
24 of this case, together with the attached Statement of Facts, Memorandum of Points and Authorities, as
25 well as the Government's Motion for Reciprocal Discovery

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I

STATEMENT OF FACTS

On January 21, 2008, at approximately 1:39 p.m., Esmeralda Salazar-Sandoval (“Defendant”) drove a 1898 Chevrolet Blazer to the Calexico West Port of Entry. Defendant applied for entry into the United States and told Customs and Border Protection Officer Weir that she had nothing to declare. She stated she had owned the vehicle for over a year and a half. CBP Officer Weir noticed that the vehicle appeared to be too clean and referred her to the secondary inspection lot.

In the vehicle secondary lot, a narcotics detection dog alerted to the passenger side quarter panel. Defendant told CBP Officer Galaviz that she was the owner of the vehicle and was driving to the Wal-Mart in Calexico. CBP Officer Galaviz inspected the vehicle and found a total of 46 packages of marijuana contained in the quarter panels, spare tire, tailgate, and both the driver and passenger side doors. The total weight of the marijuana was 46.34 kilograms (101.94 pounds).

II

DEFENDANT'S MOTIONS TO COMPEL DISCOVERY

15 The Government produced and Defendant picked up 65 pages of discovery on February 25, 2008,
16 including the reports from the Customs and Border Protection Officers and Immigration and Customs
17 Enforcement Agent, an inventory of Defendant's property, copies of the documents found in her
18 possession and in the vehicle, and photographs of the vehicle and the narcotics.

19 || (1) Defendant's Statements

The Government recognizes its obligation, under Rules 16(a)(1)(A) and 16(a)(1)(B), to provide to Defendant the substance of Defendant's oral statements and written statements. (Unless otherwise noted, all references to "Rules" refers to the Federal Rules of Criminal Procedure.) The Government has produced all of the Defendant's statements that are known to the undersigned Assistant U.S. Attorney at this date. If the Government discovers additional oral or written statements that require disclosure under Rule 16(a)(1)(A) or Rule 16(a)(1)(B), such statements will be promptly provided.

26 | (2) Arrest Reports, Notes, and Dispatch Tapes

27 The Government will provide Defendant with all known reports related to Defendant's arrest
28 in this case. The Government is not aware at this time of the existence of any dispatch tapes relevant

1 to this case. The Government will continue to comply with its obligation to provide to Defendant all
 2 reports subject to Rule 16(a)(1)(A). The Government has no objection to the preservation of the agents'
 3 handwritten notes. See United States v. Harris, 543 F.2d 1247, 1253 (9th Cir. 1976) (agents must
 4 preserve their original notes of interviews of an accused or prospective government witnesses).
 5 However, the Government objects to providing Defendant with a copy of the rough notes at this time.
 6 The Government is not required to produce the notes pursuant to the Jencks Act because the notes do
 7 not constitute "statements" (as defined 18 U.S.C. § 3500(e)) unless the notes (1) comprise both a
 8 substantially verbatim narrative of a witness' assertion, and (2) have been approved or adopted by the
 9 witness. United States v. Spencer, 618 F.2d 605, 606-07 (9th Cir. 1980). The notes are not Brady
 10 material because, as discussed further, the notes do not present any material exculpatory information
 11 or any evidence favorable to Defendant that is material to guilt or punishment. If, during a future
 12 evidentiary hearing, certain rough notes become particularly relevant, the notes in question will be made
 13 available to Defendant.

14 (3) **Brady Material**

15 The Government will perform its duty under Brady v. Maryland, 373 U.S. 83 (1963) to disclose
 16 material exculpatory information or evidence favorable to Defendant when such evidence is material
 17 to guilt or punishment. The Government recognizes that its obligation under Brady covers not only
 18 exculpatory evidence, but also evidence that could be used to impeach witnesses who testify on behalf
 19 of the United States. See Giglio v. United States, 405 U.S. 150, 154 (1972); United States v. Bagley,
 20 473 U.S. 667, 676-77 (1985). This obligation also extends to evidence that was not requested by the
 21 defense. Bagley, 473 U.S. at 682; United States v. Agurs, 427 U.S. 97, 107-10 (1976). "Evidence is
 22 material, and must be disclosed (pursuant to Brady), 'if there is a reasonable probability that, had the
 23 evidence been disclosed to the defense, the result of the proceeding would have been different.'" Carriger v. Stewart, 132 F.3d 463, 479 (9th Cir. 1997) (en banc). The final determination of materiality
 24 is based on the "suppressed evidence considered collectively, not item by item." Kyles v. Whitley, 514
 25 U.S. 419, 436-37 (1995).

27 Brady does not, however, mandate that the Government open all of its files for discovery. See
 28 United States v. Henke, 222 F.3d 633, 642-44 (9th Cir. 2000) (per curiam). Under Brady, the United

1 States is not required to provide: (1) neutral, irrelevant, speculative, or inculpatory evidence (see United
 2 States v. Smith, 282 F.3d 758, 770 (9th Cir. 2002)); (2) evidence available to the defendant from other
 3 sources (see United States v. Brady, 67 F.3d 1421, 1428-29 (9th Cir. 1995)); (3) evidence that the
 4 defendant already possesses (see United States v. Mikaelian, 168 F.3d 380-389-90 (9th Cir. 1999)
 5 amended by 180 F.3d 1091 (9th Cir. 1999)); or (4) evidence that the undersigned Assistant U.S.
 6 Attorney could not reasonably be imputed to have knowledge or control over. See United States v.
 7 Hanson, 262 F.3d 1217, 1234-35 (11th Cir. 2001). Brady does not require the Government “to create
 8 exculpatory evidence that does not exist,” United States v. Sukumolahan, 610 F.2d 685, 687 (9th Cir.
 9 1980), but only requires that it “supply a defendant with exculpatory information of which it is aware.”
 10 United States v. Flores, 540 F.2d 432, 438 (9th Cir. 1976).

11 (4) **Information That May Result in a Lower Sentence Under the Guidelines**

12 The Government will provide Defendant with all Brady material that may result in mitigation
 13 of Defendant’s sentence. Nevertheless, the Government is not required to provide information bearing
 14 on Defendant’s sentence until after Defendant’s conviction or guilty plea and prior to her sentencing
 15 date. See United States v. Juvenile Male, 864 F.2d 641, 647 (9th Cir. 1988) (no Brady violation occurs
 16 “if the evidence is disclosed to the defendant at a time when the disclosure remains in value”).

17 (5) **Defendant’s Prior Record**

18 As far as the Government is aware at this time, Defendant does not have a prior record. The
 19 Government will provide Defendant with documentation indicating this lack of a prior criminal record
 20 and thereby fulfill its duty of discovery under Rule 16(a)(1)(D).^{1/} See United States v. Audelo-Sanchez,
 21 923 F.2d 129 (9th Cir. 1990). To the extent that the Government determines that there are any
 22 additional documents reflecting Defendant’s prior criminal record, the Government will provide those
 23 to Defendant.

24 (6) **Any Proposed 404(b) Evidence**

25 The Government will disclose in advance of trial the general nature of any “other bad acts” or

27
 28 ^{1/} Defendant requests evidence of his prior record pursuant to Rule 16(a)(1)(B). The
 Government interprets this as a request pursuant to Rule 16(a)(1)(D), which is the section of the
 discovery rule pertaining to a defendant’s prior record.

1 “other acts” evidence that the United States intends to introduce at trial pursuant to Fed. R. Evid. 404(b).
 2 Evidence should not be treated as “other bad acts” evidence under Fed. R. Evid. 404(b) when the
 3 evidence concerning the other bad acts and the evidence concerning the crime charged are “inextricably
 4 intertwined.” United States v. Soliman, 812 F.2d 277, 279 (9th Cir. 1987).

5 (7) **Evidence Seized**

6 The Government has prepared and will produce copies of documents seized at the time of
 7 Defendant’s arrest. The Government will continue to comply with Rule 16(a)(1)(E)^{2/} in allowing
 8 Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy all evidence seized
 9 that is within its possession, custody, or control, and that is either material to the preparation of
 10 Defendant’s defense, or is intended for use by the Government as evidence during its case-in-chief at
 11 trial, or was obtained from or belongs to Defendant.

12 (8) **Request for Preservation of Evidence**

13 The Constitution requires the Government to preserve evidence “that might be expected to play
 14 a significant role in the suspect’s defense.” California v. Trombettta, 467 U.S. 479, 488 (1984). To
 15 require preservation by the Government, such evidence must (1) “possess an exculpatory value that was
 16 apparent before the evidence was destroyed,” and (2) “be of such a nature that the defendant would be
 17 unable to obtain comparable evidence by other reasonably available means.” Id. at 489; see also Cooper
 18 v. Calderon, 255 F.3d 1104, 1113-14 (9th Cir. 2001). The Government has made every effort to
 19 preserve evidence it deems to be relevant and material to this case, including sending a letter to the
 20 agency in charge on January 16, 2008, requesting the specific preservation of evidence. Any failure to
 21 gather and preserve evidence, however, would not violate due process absent bad faith by the
 22 Government that results in actual prejudice to the Defendant. See Illinois v. Fisher, 540 U.S. 1174, 124
 23 S.Ct. 1200 (2004) (*per curiam*); Arizona v. Youngblood, 488 U.S. 51, 57-58 (1988); United States v.
 24 Rivera-Relle, 322 F.3d 670 (9th Cir. 2003); Downs v. Hoyt, 232 F.3d 1031, 1037-38 (9th Cir. 2000).

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 27 ^{2/} Defendant requests this discovery pursuant to Rule 16(a)(1)(C). Because Rule
 28 16(a)(1)(C) only applies to organizational defendants, the Government interprets this as a request under
 Rule 16(a)(1)(E).

(9) Tangible Objects

The Government has complied and will continue to comply with Rule 16(a)(1)(E)^{3/} in allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy documents and tangible objects that are within its possession, custody, or control, and that is either material to the preparation of Defendant's defense, or is intended for use by the Government as evidence during its case-in-chief at trial, or was obtained from or belongs to Defendant. The Government need not, however, produce rebuttal evidence in advance of trial. United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984).

(10) Evidence of Bias or Motive to Lie

The Government recognizes its obligation under Brady and Giglio to provide evidence that could be used to impeach Government witnesses including material information regarding demonstrable bias or motive to lie. The Government is not aware of any evidence of any bias or motivation to lie on the part of prospective government witnesses. If the Government discovers the existence of information related to a government witness's bias or motive to lie, the information will be provided to the Defendant.

(11) Impeachment Evidence

As discussed elsewhere, the Government recognizes its obligation under Brady and Giglio to provide material evidence that could be used to impeach Government witnesses.

(12) Evidence of Criminal Investigation of Any Government Witness

Defendant is not entitled to any evidence that a prospective witness is under criminal investigation by federal, state, or local authorities. The Government is under no obligation to turn over the criminal records or rap sheet of its potential witnesses. United States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976). The Government will, however, provide the conviction record, if any, which could be used to impeach witnesses the United States intends to call in its case-in-chief.

(13) Evidence Affecting Perception, Recollection, Ability to Communicate, or Veracity

^{3/} Defendant makes this request under Fed. R. Crim. P. 16(a)(2)(C). Because there is no such subsection in Rule 16, the Government interprets this as a request under Rule 16(a)(1)(E) which applies to the discovery of documents and objects.

1 The Government recognizes its obligation under Brady and Giglio to provide material evidence
 2 that could be used to impeach Government witnesses including material information related to
 3 perception, recollection, ability to communicate, or truth telling. The Government strenuously objects
 4 to providing any evidence that a witness has ever used narcotics or other controlled substance, or has
 5 ever been an alcoholic because such information is not discoverable under Rule 16, Brady, Giglio,
 6 Henthorn, or any other Constitutional or statutory disclosure provision.

7 **(14) Witness Addresses**

8 The Government has provided Defendant with the reports containing the names, work addresses,
 9 and telephone numbers of the inspectors, officers and special agents who asked questions of Defendant
 10 and found the marijuana in the vehicle. In its trial memorandum, the Government will provide
 11 Defendant with a list of all witnesses whom it intends to call in its case-in-chief, although delivery of
 12 such a witness list is not required. See United States v. Discher, 960 F.2d 870 (9th Cir. 1992); United
 13 States v. Mills, 810 F.2d 907, 910 (9th Cir. 1987). The Government strenuously objects to providing
 14 the home addresses or the home or personal cellular telephone numbers to Defendant. In non-capital
 15 cases, the Government is not even required to disclose the names of its witnesses prior to trial. United
 16 States v. Dishner, 974 F.2d 1502, 1522 (9th Cir 1992); (citing United States v. Steel, 759 F.2d 706, 709
 17 (9th Cir. 1985)); United States v. Hicks, 103 F.23d 837, 841 (9th Cir. 1996); see also United States v.
 18 Bejasa, 904 F.2d 137 (2d Cir. 1990) (holding that United States did not improperly deny defendant
 19 access to government witnesses whose telephone numbers and addresses the government refused to
 20 provide because defendant knew the identities of the government witnesses and presumably knew their
 21 telephone numbers or could have contacted them through the exercise of due diligence).

22 **(15) Name of Witnesses Favorable to the Defendant**

23 The Government is not aware of the names of any witnesses favorable to the Defendant's case.
 24 If the Government discovers any witnesses favorable to Defendant, the names of such witnesses will
 25 be promptly provided.

26 **(16) Statements Relevant to the Defense**

27 The Government will provide all statements relevant to Defendant as required by Rule 16,
 28 Brady, and Jencks. The Government is not all possible information and evidence regarding any

1 speculative defense claimed by Defendant. Wood v. Bartholomew, 516 U.S. 1, 6-8 (1995) (per curiam)
 2 (holding that inadmissible materials that are not likely to lead to the discovery of admissible exculpatory
 3 evidence are not subject to disclosure under Brady).

4 **(17) Jencks Act Material**

5 Rule 26.2 incorporates the Jencks Act, 18 U.S.C. §3500, into the Federal Rules of Criminal
 6 Procedure. The Jencks Act requires that, after a Government witness has testified on direct examination,
 7 the Government must give the Defendant any “statement” (as defined by the Jencks Act) in the
 8 Government’s possession that was made by the witness relating to the subject matter to which the
 9 witness testified. 18 U.S.C. §3500(b). For purposes of the Jencks Act, a “statement” is (1) a written
 10 statement made by the witness and signed or otherwise adopted or approved by her, (2) a substantially
 11 verbatim, contemporaneously recorded transcription of the witness's oral statement, or (3) a statement
 12 by the witness before a grand jury. 18 U.S.C. §3500(e). If notes are read back to a witness to see
 13 whether or not the government agent correctly understood what the witness was saying, that act
 14 constitutes “adoption by the witness” for purposes of the Jencks Act. United States v. Boshell, 952 F.2d
 15 1101, 1105 (9th Cir. 1991) (citing Goldberg v. United States, 425 U.S. 94, 98 (1976)). There is no
 16 applicable Jencks material at this time. If the case proceeds to trial, the Government will produce any
 17 materials covered by the Jencks Act relevant to the testifying witness(es).

18 **(18) Giglio Information**

19 An agreement that the Government makes with a witness for testimony in exchange for money
 20 or in exchange for favorable treatment in the criminal justice system is generally subject to disclosure
 21 as impeachment evidence under Brady and Giglio. See United States v. Kojayan, 8 F.3d 1315, 1322-23
 22 (9th Cir. 1993); Benn v. Lambert, 238 F.3d 1040, 1054-60 (9th Cir. 2002). The Government is not
 23 aware of any Giglio information related to this case. If the Government discovers the existence of
 24 Giglio information, the information will be provided to the Defendant.

25 **(19) Report of Scientific Tests or Examinations**

26 At this time, the only scientific test that the Government is aware of is an analysis of the
 27 marijuana by the DEA laboratory. The Government has not yet received the results of that analysis, but
 28 will provide Defendant with the results of any scientific tests or examinations in accordance with Rule

1 16(a)(1)(F) when those tests results are received.

2 (20) **Henthorn Material**

3 The Government will comply with United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991) and
4 request that all federal agencies involved in the criminal investigation and prosecution review the
5 personnel files of the federal law enforcement inspectors, officers, and special agents whom the
6 Government intends to call at trial and disclose information favorable to the defense that meets the
7 appropriate standard of materiality. United States v. Booth, 309 F.3d 566, 574 (9th Cir. 2002) (citing
8 United States v. Jennings, 960 F.2d 1488, 1489 (9th Cir. 1992)). If the undersigned Assistant U.S.
9 Attorney is uncertain whether certain incriminating information in the personnel files is “material,” the
10 information will be submitted to the Court for an in camera inspection and review.

11 (21) **Informants and Cooperating Witnesses**

12 At this time, the United States is unaware of any informants or cooperating witnesses related to
13 this case. If the United States determines that there is a confidential informant whose identity is
14 “relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause,” it
15 will disclose that person’s identity to the Court for in-chambers inspection. See Roviaro v. United
16 States, 353 U.S. 53, 60-61 (1957); United States v. Ramirez-Rangel, 103 F.3d 1501, 1505 (9th Cir.
17 1997).

18 (22) **Expert Witness**

19 The Government will provide notice prior to trial of any expert witnesses that will be called to
20 testify at trial.

21 (23) **Narcotics Detector Doc Information**

22 The Government objects to this request because the requested information is not relevant at this
23 time. Defendant has not raised an issue regarding the accuracy or effectiveness of the performance of
24 the narcotics detector dog in this case. If the Court believes that such an issue is relevant, the
25 Government will endeavor to provide the appropriate information at that time.

26 (24) **Training of Relevant Law Enforcement Agencies**

27 The United States objects to any request for discovery of policies, instructions and training
28 manuals regarding the interrogation of subjects or handling of evidence.

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2 (25) **Performance Goals and Policy Awards**

3 The United States objects to any request for disclosure of performance goals and policy awards
4 with respect to the detection of criminal activity.

5 (26) **Opportunity to Weigh , Count, View and Photograph Contraband**

6 The United States has complied and will continue to comply with Rule 16(a)(1)(E) in allowing
7 Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy all tangible objects
8 seized that is within its possession, custody, or control, and that is either material to the preparation of
9 Defendant's defense, or is intended for use by the United States as evidence during its case-in-chief at
10 trial, or was obtained from or belongs to Defendant. The United States need not, however, produce
11 rebuttal evidence in advance of trial. United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984).

12 (27) **DEA-7 Form**

13 The United States has not at this time received a completed DEA-7 analysis from the laboratory.
14 When such analysis is complete, the United States will produce it to Defendant.

15 (28) **TECS Reports**

16 If the United States intends to introduce TECS information at trial, discovery of the relevant
17 TECS reports will be made at least by the time of the filing of its trial memorandum.

18 III

19 **MOTION TO PRESERVE AND RE-WEIGH NARCOTIC EVIDENCE**

20 The undersigned AUSA sent a letter on February 20, 2008, to the Acting Special Agent in
21 Charge, U.S. Department of Homeland Security, requesting that the narcotics and vehicle be preserved
22 until the conclusion of the case. The United States will continue to endeavor to preserve the physical
23 evidence in order to comply with any future court orders.

24 IV

25 **DEFENDANT'S MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS**

26 The Government does not object to the granting of leave to file further motions as long as the
27 further motions are based on newly discovered evidence or discovery provided by the Government
28 subsequent to the instant motion at issue.

I

V

GOVERNMENT'S MOTION FOR RECIPROCAL DISCOVERY

A. All Evidence That Defendant Intends To Introduce In Her Case-In-Chief

5 Since the Government will honor Defendant's request for disclosure under Rule 16(a)(1)(E),
6 the Government is entitled to reciprocal discovery under Rule 16(b)(1). Pursuant to Rule 16(b)(1),
7 the Government requests that Defendant permit the Government to inspect, copy and photograph
8 any and all books, papers, documents, photographs, tangible objects, or make copies or portions
9 thereof, which are within the possession, custody, or control of Defendant and which Defendant
10 intends to introduce as evidence in her case-in-chief at trial.

11 The Government further requests that it be permitted to inspect and copy or photograph any
12 results or reports of physical or mental examinations and of scientific tests or experiments made in
13 connection with this case, which are in the possession and control of Defendant, which she intends
14 to introduce as evidence-in-chief at the trial, or which were prepared by a witness whom Defendant
15 intends to call as a witness. The Government also requests that the Court make such order as it
16 deems necessary under Rules 16(d)(1) and (2) to ensure that the Government receives the reciprocal
17 discovery to which it is entitled.

B. Reciprocal Jencks – Statements By Defense Witnesses (Other Than Defendant)

19 Rule 26.2 provides for the reciprocal production of Jencks material. Rule 26.2 requires
20 production of the prior statements of all witnesses, except a statement made by Defendant. The time
21 frame established by Rule 26.2 requires the statements to be provided to the Government after the
22 witness has testified. However, to expedite trial proceedings, the Government hereby requests that
23 Defendant be ordered to provide all prior statements of defense witnesses by a reasonable date
24 before trial to be set by the Court. Such an order should include any form in which these statements
25 are memorialized, including but not limited to, tape recordings, handwritten or typed notes and
26 reports.

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3 **VI**

4 **CONCLUSION**

5 For the foregoing reasons, the Government requests that the Court deny Defendant's
6 motions, except where unopposed, and grant the Government's motion for reciprocal discovery.

7 DATED: March 11, 2008.

8

9 Respectfully submitted,

10 KAREN P. HEWITT
11 United States Attorney

12 /s/*Rebecca Kanter*
13 REBECCA S. KANTER
14 Assistant United States Attorney
15 Attorneys for Plaintiff
16 United States of America

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Criminal Case No. 08cr0285-H
Plaintiff,)
v.) CERTIFICATE OF SERVICE
ESMERALDA SALAZAR-SANDOVAL,)
Defendant.)
_____)

IT IS HEREBY CERTIFIED THAT:

I, REBECCA S. KANTER, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **RESPONSE AND OPPOSITION** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Leila Morgan

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 11, 2008.

/s/ **Rebecca Kanter**
REBECCA S. KANTER